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No. 03-1077

In The Supreme Court of the United States

COREY THOMAS,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

ANTHONY A. MONTAGUE,

Petitioner,

v.

ASPLUNDH TREE EXPERT CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

WAL-MART'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any split of authority among the courts of appeals, this Court should grant certiorari to jointly review these two highly fact-intensive claims of race discrimination to determine whether the court of appeals correctly held that the respective Petitioners failed to make a submissible jury case.

RULE 29.6 STATEMENT

Respondent is Wal-Mart Stores, Inc. It has no parent corporation, and no publicly-held company owns 10% or more of its stock.

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WAL-MART'S BRIEF IN OPPOSITION

Respondent Wal-Mart Stores, Inc. ("Wal-Mart") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's unpublished *per curiam* opinions in the cases of *Thomas v. Wal-Mart* and *Montague v. Asplundh Tree Experts*. As discussed below, Wal-Mart does not believe that the judgments in these two separate cases can be challenged in a single petition. The cases are different in many material respects and do not present the "identical or closely-related questions" required by Rule 12.4. Should the Court conclude nevertheless that Rule 12.4 has been properly invoked, Wal-Mart opposes a grant of review for the reasons stated below, as well as for those set forth in Respondent Asplundh's Brief in Opposition.

STATEMENT OF THE CASE

Petitioners' Statement of Case omits or understates facts material to this Court's consideration of the issues. Some of the material facts discussed in the opinion of the court of appeals (Pet. App. 2-10) that the Petitioners neglect to address are briefly highlighted below.

During the eighteen months that Petitioner Corey Thomas worked for Wal-Mart, he was promoted several times, with his final position being an assistant manager. In the spring of 2000, Wal-Mart held a "grass roots" meeting in each of its stores to allow employees to voice concerns about management. Several employees complained that Thomas regularly injected race into employee discussions, was not observed in the store, did not properly supervise employees because he spent hours playing cards

with female employees in the manager's office, and did not perform substantial work as had previous night assistant managers. In violation of a company policy designed to protect confidentiality, Thomas discussed with an employee what was said at the "grass roots" meeting and why that employee did not stand up for him. Soon after the meeting, Thomas had an in-store altercation with one of his subordinates. The subordinate advised the store manager that he was going to call the police because he felt Thomas had threatened him.

Thomas' supervisors at Wal-Mart conducted an investigation of his conduct that revealed numerous other complaints that Thomas behaved inappropriately and violated company policy. The complaints generally involved sexual misconduct alleged to violate Wal-Mart's anti-harassment policies. After the investigation, Wal-Mart fired Thomas, advising him that the reason for his termination was an accumulation of reported violations involving sexual harassment and inappropriate conduct.

Thomas filed a lawsuit in the United States District Court for the Northern District of Alabama alleging that he was fired without good cause and that the reasons given for his termination were a pretext for intentional discrimination on the basis of race. He also alleged that he was terminated in retaliation for complaints he made about race discrimination. On March 26, 2003, the trial court granted summary judgment in favor of Wal-Mart, concluding, among other things, that Thomas did not offer any evidence from which a reasonable juror might infer that the investigation was conducted in bad faith, or that Wal-Mart knew that the allegations were untrue. On October 30, 2003, the Eleventh Circuit affirmed, holding that Thomas did not establish a *prima facie* case of racial

discrimination and that he did not introduce sufficient evidence to raise a genuine issue of material fact regarding whether Wal-Mart's proffered legitimate reasons for its decision were actually a pretext for racial discrimination or retaliation.

REASONS FOR DENYING THE PETITION

The cases at issue here are garden-variety employment disputes where the Eleventh Circuit applied settled law to the particular facts presented. The Petition raises no significant questions of federal law. No split in the circuits is discussed or exists. The Petitioners did not properly preserve the questions presented. The two judgments do not present "closely related questions" and so should not be challenged in a single petition under Supreme Court Rule 12.4. For these reasons, the Petition should be denied.

I. THE JUDGMENTS DO NOT PRESENT CLOSELY-RELATED QUESTIONS.

Petitioners seek review of two separate judgments of the Eleventh Circuit, one in favor of Wal-Mart and one in favor of Asplundh Tree Expert Co. There was no coordination of the cases in either the district court or court of appeals. Each case is highly fact intensive – as revealed by the detailed recitation found in the Petition's nineteen-page "Statement of the Cases." The cases involve different employers, different employee conduct, different company policies, and different rationales for the employment decision at issue. Whether either Petitioner could make a *prima facie* case of discrimination or prove that the

employer's reason for a job action was actually a pretext for racial discrimination depends on the particular facts of each case. No generalizations can be made.

The legal reasoning of the court of appeals was also different in the two cases. In *Thomas*, the Eleventh Circuit made alternative holdings, ruling both that the plaintiff failed to make a *prima facie* case and that, even if he had, he failed to show that Wal-Mart's proffered reason for termination was a pretext for discrimination or retaliation. In *Montague*, the Eleventh Circuit ruled only the plaintiff's evidence failed to create an issue of fact regarding pretext. In addition, in *Thomas*, the court of appeals did not discuss *Desert Palace v. Costa*, 123 S.Ct. 2148 (2003), presumably because the legal doctrine interpreted in *Desert Palace* was not raised by Thomas in the court of appeals until his reply brief. Thus, in *Thomas* the court of appeals never discussed any issues related to the Petition's second Question Presented.

In short, the facts underlying the two cases joined in the Petition are different, as is the legal reasoning behind the judgments. In the later *Thomas* decision, the court of appeals also did not rely on (or even mention) its decision in *Montague*. The two judgments thus do not involve "identical or closely related questions" under Rule 12.4 and should not have been joined. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 540-541 (1994) (allowing combined petition where two judgments were against the same employer, where the same legal question was presented, and where the second opinion expressly relied on the holding of the first opinion); *Rodriguez v. Compass Shipping*, 451 U.S. 596, 598 (1981) (three cases by longshoremen against their employers combined in a single petition where same legal question was presented and

where cases were decided by court of appeals on the same day using the same legal reasoning). The Petition should therefore be denied.

II. THE PETITION MISSTATES THE REASONING OF THE COURT OF APPEALS AND SEEKS REVIEW ONLY OF THE APPLICATION OF A SETTLED LEGAL STANDARD TO UNIQUE FACTS.

In the first Question Presented, the Petition contends that the court of appeals improperly required "a closely similar comparator as the sole method for avoiding summary disposition" in any employment discrimination case. This "Question" is not an accurate description of the basis for the Eleventh Circuit's rulings, and, in any event, is not worthy of this Court's review.

The Eleventh Circuit did not hold that proof of a "closely similar comparator" is the "sole method for avoiding summary disposition" in a race discrimination case. The court of appeals expressly acknowledged that "[d]emonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." (Pet. App. 40) (quotation marks omitted). Thus, the Petition's suggestion that the court of appeals ignored the statement in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002), that the *prima facie* case "relates to the employee's burden of presenting evidence that raises an inference of discrimination" (Pet. 22), is contrary to the text of the opinion of the court of appeals.

The court of appeals expressly recognized that there were different ways under *McDonnell Douglas v. Green*,

411 U.S. 792, 802 (1973), for plaintiffs to make a *prima facie* case. The methods listed in the opinions include proof that each plaintiff suffered "disparate treatment because of membership in the protected class" (Pet. App. 40), that the plaintiff was "replaced by a person outside the protected class" (Pet. App. 40, 11), or that the employer "treated similarly situated employees outside of his classification more favorably" (Pet. App. 11). Nor is proof of "a closely similar comparator" the sole method for the plaintiff to prove that the legitimate reason advanced by the employer for the termination was mere pretext for discrimination. The court of appeals stated in *Montague* that proof that "similarly situated non-minority employees were disciplined differently based on similar conduct" is only an "*example*" of the kind of circumstantial evidence that plaintiff can use to "persuade the fact finder that [the employer's] reason for terminating him is not worthy of belief." (Pet. App. 41 n.1.) (emphasis added). In the *Thomas* case, neither the court of appeals (Pet. App. 12) nor the district court (Pet. App. 30-31) mentioned any requirement that pretext be proved only by evidence of a "closely similar comparator." Petitioners have misstated the ruling of the court of appeals and the Eleventh Circuit's approach to these issues is fully consistent with *McDonnell Douglas* and its progeny.

To be sure, the court of appeals did review as part of its analysis whether a similarly situated non-minority had been treated differently by Wal-Mart. This analysis is appropriate under this Court's teachings, *see Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) ("*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally"), is consistent with the decisions of other

circuits, *e.g. Haywood v. Lucent Technologies*, 323 F.3d 524, 530 (7th Cir. 2003); *Aragon v. Republic Silver State Disp.*, 292 F.3d 654, 658 (9th Cir. 2002), and exactly what Petitioners asked the court of appeals to do. For example, Thomas' opening brief in the Eleventh Circuit (a) stated that "[a] Title VII plaintiff may make out a prima facie case by a showing of disparate treatment among similarly placed employees" (p. 26), (b) admitted that a plaintiff needs to prove that his "former position was filled by someone outside his protected class, or a similarly situated employee was treated more favorably" (p. 28), and (c) argued that he had made a submissible case because "white Assistant Managers whose performance was satisfactory are similarly situated" (p. 26). Because Thomas asked the court of appeals to consider these issues, he cannot now complain that it did so. The issue has thus been waived.

Despite Petitioners' efforts to obfuscate the issue, the court of appeals did not depart from this Court's decisions but instead engaged in the proper (and routine) application of the test articulated in *McDonnell Douglas*, 411 U.S. at 802-804, and explained further in cases such as *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 142 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-507 (1993), to determine whether a plaintiff is entitled to a jury trial. The Petition thus seeks no more than review of the court of appeals' application of settled law to the peculiar facts presented. Indeed, the Petition does not point to a single decision of any court of appeals that conflicts with that of the Eleventh Circuit's unpublished *per curiam* decisions in these cases. The Petition should be denied.

III. *DESERT PALACE* DID NOT OVERRULE *MCDONNELL DOUGLAS*.

Petitioner's second question presented has as its unstated premise that the decision in *Desert Palace v. Costa*, 123 S.Ct. 2148 (2003), *sub silentio* overruled *McDonnell Douglas*'s established holding that after an employer produces evidence that the employee was terminated for a legitimate, nondiscriminatory reason, it falls to the plaintiff to produce evidence that the legitimate reason was a pretext for racial discrimination. *Desert Palace* did not affect the standard rules announced in *McDonnell Douglas*. Moreover, the *Desert Palace* issues were not preserved for review, and, as with the first Question Presented, there is no division of authority on this subject among the courts of appeals.

The court of appeals' opinions in these cases held that if an employer proffers a legitimate, non-discriminatory reason for the adverse employment action, the plaintiff must demonstrate that the employer's proffered reason is a pretext for discrimination. (Pet. App. 11, 40). This approach is fully consistent with this Court's direction from *McDonnell Douglas*, where the Court held that once the employer offers a legitimate, nondiscriminatory reason for the job action, the plaintiff must "be afforded a fair opportunity to show that [the] stated reason for [the] rejection was in fact pretext." 411 U.S. at 804; *see also Burdine*, 450 U.S. at 252-253. Contrary to the suggestion in the Petition, the court of appeals did not shift the "burden of proof" to the plaintiff on this subject; rather, it was only the burden of production that shifted. (Pet. App. 40).

Desert Palace did not even mention *McDonnell Douglas*, let alone overrule the well-established burden-shifting

approach established by that case. This Court in fact reaffirmed *McDonnell Douglas* after *Desert Palace* in *Raytheon Company v. Hernandez*, 124 S.Ct. 513, 517-518 & n.3 (2003). According to *Raytheon*, once the defendant provides "a legitimate, nondiscriminatory reason" for its employment action, the "only remaining question would be whether [plaintiff] could produce sufficient evidence from which a jury could conclude that [the] 'stated reason for respondent's rejection was in fact pretext.'" *Id.*; *see also id.* at 519. The Eleventh Circuit's decisions below are fully consistent with *Raytheon* and *McDonnell Douglas*.

Desert Palace has no application to the cases at issue in this Petition because *Desert Palace* applies only in so-called "mixed motive" cases. *Desert Palace*, 123 S.Ct. at 2153. "Mixed motive" cases are those where discrimination is shown to be a motivating factor in the job decision but the employer claims that the same job action would have been taken regardless. *Id.* at 2151. "Mixed motive" cases were described in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and are different from "pretext" cases where the plaintiff argues under *McDonnell Douglas* that while the employer advanced a legitimate, non-discriminatory reason for the job action, the real reason for the decision was discrimination. *See, e.g. Hill v. Lockheed Martin Logistics*, 354 F.3d 277, 284-285 (4th Cir. 2004) (en banc) (explaining the differences between the two doctrines in a post-*Desert Palace* case).

Contrary to Petitioners' claims (Pet. 4, 26), these are not "mixed motive" cases. There was no evidence race was a motivating factor. Although the employers did raise the doctrine in their answers filed at the beginning of the case, the doctrine was not the basis for the summary judgment entered by the trial court or the judgment of the court of

appeals. Petitioners instead argued in the trial court and on appeal that their cases were governed by *McDonnell Douglas*'s burden-shifting approach and that they were entitled to a jury trial because they had "established a *prima facie* case" and that they were "fired based upon a pretext." (Brief of Petitioner Thomas in Opposition to Summary Judgment, pp. 5, 8). Petitioners waited until their reply brief in the court of appeals to raise the "mixed motive" theory and neither opinion of the court of appeals treated this as a "mixed motive" case. Because the doctrine has its roots in 1989's *Price Waterhouse* decision, the raising of the argument in a reply brief was insufficient to preserve the issue for review. *See Pruett v. Village News*, 2003 WL 22833376, *1 n.2 (8th Cir. 2003) (refusing to consider a *Desert Palace* argument because plaintiff "did not raise the issue that this is a 'mixed-motive' case until the filing of her supplemental brief"). Indeed, in the *Thomas* case the court of appeals did not address the impact of *Desert Palace* at all, demonstrating that Thomas should have raised the point sooner if he wished to preserve the point for review.

Desert Palace was decided last term. No division of authority exists among the circuits regarding how it should be interpreted in cases such as those at issue here. The Petition does not cite a single case disagreeing with the approach of the Eleventh Circuit and holding that *Desert Palace* altered the burden-shifting approach required by *McDonnell Douglas* for cases involving claims of "pretext." To the contrary, this Court and the courts of appeal continue to recognize that once the defendant presents evidence of a legitimate, nondiscriminatory reason for the job action, the plaintiff must produce evidence that the proffered reason is actually a pretext for

discrimination. *E.g.*, *Raytheon*, 124 S.Ct. at 517-519; *Estades-Negroni v. Associates Corp.*, 345 F.3d 25, 32 (1st Cir. 2003); *Hill*, 354 F.3d at 285. This case thus again seeks review of whether the court of appeals properly applied settled law to the particular facts of these two different cases.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 26, 2004